but with the sound public policy which led to the enactment of the Statute of Frauds and the later wills acts in England and in this country. Where a testator has unconditionally stated his intention to revoke an earlier testamentary paper and accompanied it with a different disposition of his property, it is a matter of conjecture what he would have intended had he known that his later disposition would fail. When the courts attempt to determine that intention, serious difficulties are certain to follow. The policy of all our statutes has been to require testamentary papers to fulfill certain formalities, in order to do away with proof of wills by parol testimony. It is an inherent weakness of the doctrine of dependent relative revocation that it introduces parol testimony into all cases where it is applied, and it seems best, therefore, that it should be strictly limited in its operation.

W. W. S.

QUASI-CONTRACT — WORK AND LABOR — FRAUD — A difficult problem arises where compensation is sought for services rendered in the family relation. Express contracts under such circumstances are rare, and in the absence of a contract recovery is almost impossible. Nor will the law imply a contract of this sort. The rule is that services thus rendered will be presumed gratuitous.[1] The party seeking recovery is thus left to his quasi-contractual remedy. In many jurisdictions, however, the quasi-contractual action is restricted to cases in which a definite sum of money has come into the hands of the party sought to be charged; in these jurisdictions the party seeking repayment for his services is apparently without a remedy.[2]

In a jurisdiction where the quasi-contractual action is not so restricted,[3] other limitations must be taken into account. The presumption above mentioned, that the services were gratuitous, must be rebutted, and this, it seems, can be done only where fraud is shown to have been perpetrated.[4]

A great deal of work is doubtless performed with a vague expectation of future reward by persons more or less remotely related to the beneficiary—witness the extreme solicitude with which a galaxy of relatives attend the illness of a dying testator. When the anticipated return has not been realized, the resort is usually and necessarily to the action *ex quasi contractu*. It is, however, recognized that such actions are in the nature of an afterthought, the result of disappointed expectations. The lips of an

[1] Kingston v. Roberts, 137 S. W. 1042 (Mo. 1913).
[2] Graham v. Stanton, 177 Mass. 321 (1901).
[3] Blowers v. Southern Ry. Co., 74 S. C. 221 (1906).
[4] Peter v. Steel, 3 Yeates 250 (Pa. 1800).

important party to the transaction are closed, and except in the case of fraud, the presumption is rigorously applied. It should, however, be noted that the presumption that the services thus rendered are gratuitous, like the more general presumption that work is to be paid for, is merely a presumption of evidence and not of law. An examination of the cases on the point, however, reveals the fact that it is an almost irrebutable presumption.[5]

A very doubtful situation is presented where services are rendered by A to B, both parties being under the erroneous impression that they are related. When the actual facts are brought home to A he seeks to recover the value of the labor he has bestowed upon B, which, he alleges, he would not have performed gratuitously had he been aware of the actual status of the parties. On the other hand, it is not at all clear that B would have received the services had he believed they were to be paid for. A distinction might, indeed, be drawn depending upon the nature of the services. Where it could be shown that the services were absolutely necessary, and, but for A's performance, B would have been compelled to employ a third party, recovery should be allowed. The question is more or less academic, as the precise point does not seem to have arisen.

In the usual case the question is entirely one of evidence, with a very strong presumption against the party seeking recovery. Upon him is the burden of establishing a contract, no quasi-contractual problem being at all involved. It is not at all easy to justify the exception made in this case to the general rule that all services are to be compensated, upon any legal or logical basis. The point has been made that the very existence of the family relation negatives any notion of payment; that the amenities of family life call for a great deal of work and labor, which, in ordinary social intercourse, must be paid for. "The family relationship," it has been judicially said,[6] "is presumed to abound in reciprocal acts of kindness and good-will, which tend to the mutual comfort and convenience of the members of the family and are gratuitously performed." The *raison d'être* as thus stated by the courts and quoted with approval by text-writers, hardly suffices to cover the case before mentioned, where the services are rendered under the mistaken impression that the parties are related. In such case the *intent* with which the services were given, which is stressed in the opinion quoted, would seem immaterial. The plaintiff would admit that at the time the services were performed there was no expectation of the payment sought to be recovered; but it would also be submitted that the action was a quasi-contractual one, and brought on the broad basis of substantial justice, irrespective of and possibly in the teeth of the actual intent. It may be pointed out in passing that in no case has friendship or the amenities of social life been allowed to overcome the

[5] Walker v. Taylor, 28 Col. 233 (1901).

[6] Disbrav v. Durand, 54 N. J. L. 343 (1892).

general presumption of payment for services rendered, which the law has adopted.

It may therefore be stated that where relief is sought in quasi-contract on the ground of mistake of fact, the intent of the parties at the time the transaction took place should not be a decisive factor. The same is true with even greater force where it is shown that the labor has been secured by the imposition of fraud. A very recent case adopts just this line of reasoning. In *Sanders* v. *Ragan*,[7] recovery was sought against the estate of the deceased for services rendered by the plaintiff as his housekeeper. A ceremony of marriage had been performed, and the plaintiff believed she was the wife of the deceased, but on his death it appeared that he had been lawfully married to another woman who was still alive. The court permitted recovery, saying *inter alia:* "The action of assumpsit as stated, is dependent largely upon equitable principles, and in the absence of a special contract controlling the matter, it will usually lie where one man has been enriched or his estate enhanced at another's expense that in equity and good conscience call for an accounting by the wrongdoer." The court refused to apply as a test the intention of the parties. It cut through the contractual *form* of the action and adopted the logic of a similar case, in which it was stated that an implied promise does not always depend upon the existence of an intention in fact of the one to pay and the other to receive. "The law frequently affixes a promise to pay even contrary to the actual intention." [8]

Some of the courts, however, have denied recovery for services rendered under mistake of fact or even in cases of fraud on the ground that *payment was not intended.* In *Cooper* v. *Cooper*,[9] under facts analogous to those of the principal case, the court in denying recovery said: "The fact that she (the plaintiff) believed herself to be a wife, excluded the inference that the society and assistance of a wife which she gave to her supposed husband were for hire." The actual decision of the court can be justified under the Massachusetts doctrine which permits recovery in quasi-contract only where money has come into the hands of the tort-feasor, but it is submitted that the language used by the court clearly shows that such was not the ground for the decision.

It is submitted that the rule of law which considers work done in the family gratuitous, and the exception thereto which permits recovery in case of fraud, can be put upon a single basis. It may be stated that a party cannot recover for services thus rendered because of the absence of a contract, express or implied; normally he cannot recover in quasi-contract because no equity requires that

[7] 90 S. E. 777 (N. C. 1916).
[8] Hickham v. Hickam, 46 Mo. App. 504 (1891).
[9] 147 Mass. 370 (1888).

he be compensated. The family may be considered as embarked upon a mutual enterprise, and in aiding any particular member of the group one but aids himself. In the principal case no equity requires that a wife be paid for her services. These are bestowed in the mutual partnership out of the profits of which the law gave her, as wife, certain benefits. In so far as no such status existed, however, she should be entitled to at least the value of her services as employee.

B. W.